Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra Malaysia Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–753 OF 1998

SHAIK DAUD, MOKHTAR SIDIN DAN MOHD SAARI JJCA

25 NOVEMBER 2000

Civil Procedure *— Appeal — Record of appeal — Main appeal record filed within time — Whether leave was obtained to file supplementary record of appeal out of time*

On 20 October 1998 the respondent obtained an order to set aside the order to strike out the respondent's writ and statement of claim. The appellant appealed against that order. The main appeal record was filed within time, which the appeal record did not include sealed copy of the order granted on 20 October 1998. The respondent raised a preliminary objection on the ground that the appellant had not obtained leave to include in the appeal record the sealed copy of the court order.

Held, striking out the appeal:

On the facts of the case, as the appellant had failed to obtain leave to file supplementary record of appeal out of time, the court upheld the preliminary objection by the respondent. Consequently, the court held that there was no proper appeal record before the court (see p 445D–E).

[**Bahasa Malaysia summary**

Pada 20 Oktober 1998 responden telah memperoleh satu perintah untuk mengenepikan perintah membatalkan writ dan penyataan tuntutan responden. Perayu telah membuat rayuan terhadap perintah tersebut. Laporan rayuan utama telah difailkan di dalam tempoh masa, di mana laporan rayuan tersebut tidak termasuk salinan meterai perintah yang diberikan pada 20 Oktober 1998. Responden telah menimbulkan satu bantahan awal atas alasan bahawa perayu tidak mendapat kebenaran untuk memasukkan ke dalam laporan rayuan tersebut salinan meterai perintah mahkamah.

Diputuskan, membatalkan rayuan tersebut:

Berdasarkan kes tersebut, memandangkan perayu telah gagal untuk mendapat kebenaran untuk memfailkan laporan rayuan tambahan di luar tempoh masa, mahkamah telah membenarkan bantahan awal daripada responden. Oleh yang demikian, mahkamah telah memutuskan bahawa tiada laporan rayuan yang betul di hadapan mahkamah (lihat ms 445D–E).]

Notes

For cases on appeal, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 369–964.

Cases referred to

Capital Insurance Bhd v Kassim bin Mohd Ali [2000] 1 MLJ 193 (refd)

Legislation referred to

Rules of the High Court 1980 O 18 rr 18(4), (7), 19(1)(b), (c)

Appeal from: Suit No D2–22–1117 of 1992 (High Court, Kuala Lumpur)

Teh Meng Teck (*Richard WG Lee* and *Tina Cheah* with him) (*Cheah Teh & Su*) for the appellant.

Azhar Arman Ali (*Md Yunos Shariff* with him) (*Wan Marican, Hamzah & Shaik*) for the respondent.

Mohd Saari J. CA (delivering the judgment of the court): In this appeal, the first defendant ('the appellant') is dissatisfied with the order of the High Court granted on 20 October 1998.

Factual background

The respondent filed this action against the appellant who stood as a guarantor of an overdraft facility for RM500,000 granted to one Wira Kris Agricultural Services Sdn Bhd ('the Borrower'). The appellant filed his defence and also filed a summons in chambers ('SIC') for an order under O 18 r 19(1)(b) and (c) of the RHC 1980 to strike out the respondent's writ and statement of claim.

SIC was part heard, but on the date of its continued hearing on 17 September 1994, the respondent's counsel was absent. The court proceeded with the hearing and granted the application to strike out the respondent's writ and statement of claim.

Subsequently, the respondent filed two applications:

(i) an application to set aside the order granted on 17 September 1994.

(ii) an application to amend SIC (encl 16).

On 20 October 1998, the court allowed both the applications. Against that order, the appellant appeals to this court.

It is not in dispute that the main appeal record was filed within time, which did not include the sealed copy of the order granted on 20 October 1998 From the last date of filing the appeal record to this date 20 September 2000, there is a lapse of about one and a half years.

The learned counsel for the respondent raised a preliminary objection on the ground that the appellant had not obtained leave to include in the

appeal record the sealed copy of the court order granted on 20 October 1998.

Issue

The issue for determination is whether the appeal is properly before the court.

Finding

In this regard, it is pertinent to refer to the relevant statutory provisions. For ease of reference, r 18(4) and (7) of the Rules of the Court of Appeal 1994 is reproduced below:

> 18 Memorandum of appeal
> (1) …
> (2) …
> (3) …
> (4) The appellant shall attach to such memorandum copies of the proceedings in the High Court, including —
> (a) copies of the documents in the nature of pleadings, so far as is necessary for showing the matter decided and the nature of the appeal;
> (b) a copy of the Judge's note of the hearing of the cause or matter in which the decision appealed against was given;
> (c) copies of all affidavits read and of all documents put in evidence in the High Court so far as they are material for the purposes of the appeal, and subject to rule 101 if such documents are not in the national language, copies of certified translations thereof;
> (d) a copy of the judgment, decree or order appealed from;
> (e) a copy of the written judgment or grounds of decision of the Judge, or a copy of the agreed notes of judgment as prepared by the parties and approved by the Judge, if such written judgment, grounds of decision or agreed notes as approved is made available within the time limited for filing the record of appeal, provided that if the Court so orders, the absence of the written judgment, grounds of decision or agreed notes shall not prevent the appellant from proceeding with his appeal; and
> (f) a copy of the notice of appeal.
> (5) …
> (6) …
> (7) The memorandum and copies above referred to which, together shal be called the record of appeal, shall be filed at the Registry within six weeks after the entry of the appeal or within such further time as the Court may allow.
> (8) …
> (9) …
> (10) …

For the appellant, En Teh Meng Teck argued that for the purpose of tendering the sealed copy of the court order, it would suffice if the appellant were to tender the sealed copy of the court order at any time before the hearing of this appeal, as here. The learned counsel relied on Practice Direction No 1 of 1992.

A On the requirement to comply with the aforesaid statutory provisions, in *Capital Insurance Bhd v Kassim bin Mohd Ali* [2000] 1 MLJ 193 at p 200, Mokhtar Sidin JCA said:

> It is clear to us that the practice direction allowed an appellant to file without leave a sealed copy of the order not received with the notes of evidence and the judgment in a separate bundle which is called the supplementary appeal record when the order was not received in time and it must be done as soon as the appellant received the sealed copy of that order. Nowhere is it stated in the practice direction that if it is not done in time (reasonable time after receiving the sealed copy of the order) that it could be filed without leave of the court. The onus is on the appellant that the supplementary appeal record was filed soon after it received the sealed copy of the order. Rule 18(7) makes it clear that all filing of documents must be done within the stipulated time. It is imperative to us that an appellant is not allowed to file the supplementary appeal record at any time it likes just because of the practice direction. *In our view whatever supplementary appeal record to be filed pursuant to that practice direction, it must be done within the stipulated time otherwise leave of the court must be obtained.* In this appeal the appellant has not satisfied us that the supplementary appeal record was filed in time. In our opinion the failure on the part of the appellant to apply for leave to file out of time is fatal. (Emphasis added.)

On the facts of the instant case, as the appellant had failed to obtain leave to file the supplementary record of appeal out of time, we upheld the preliminary objection by the respondent. Consequently, we hold that there was no proper appeal record before us to consider. This appeal is struck off with costs. Deposit to the respondent towards account of taxed costs.

Appeal struck off.

Reported by Jafisah Jaafar